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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 281

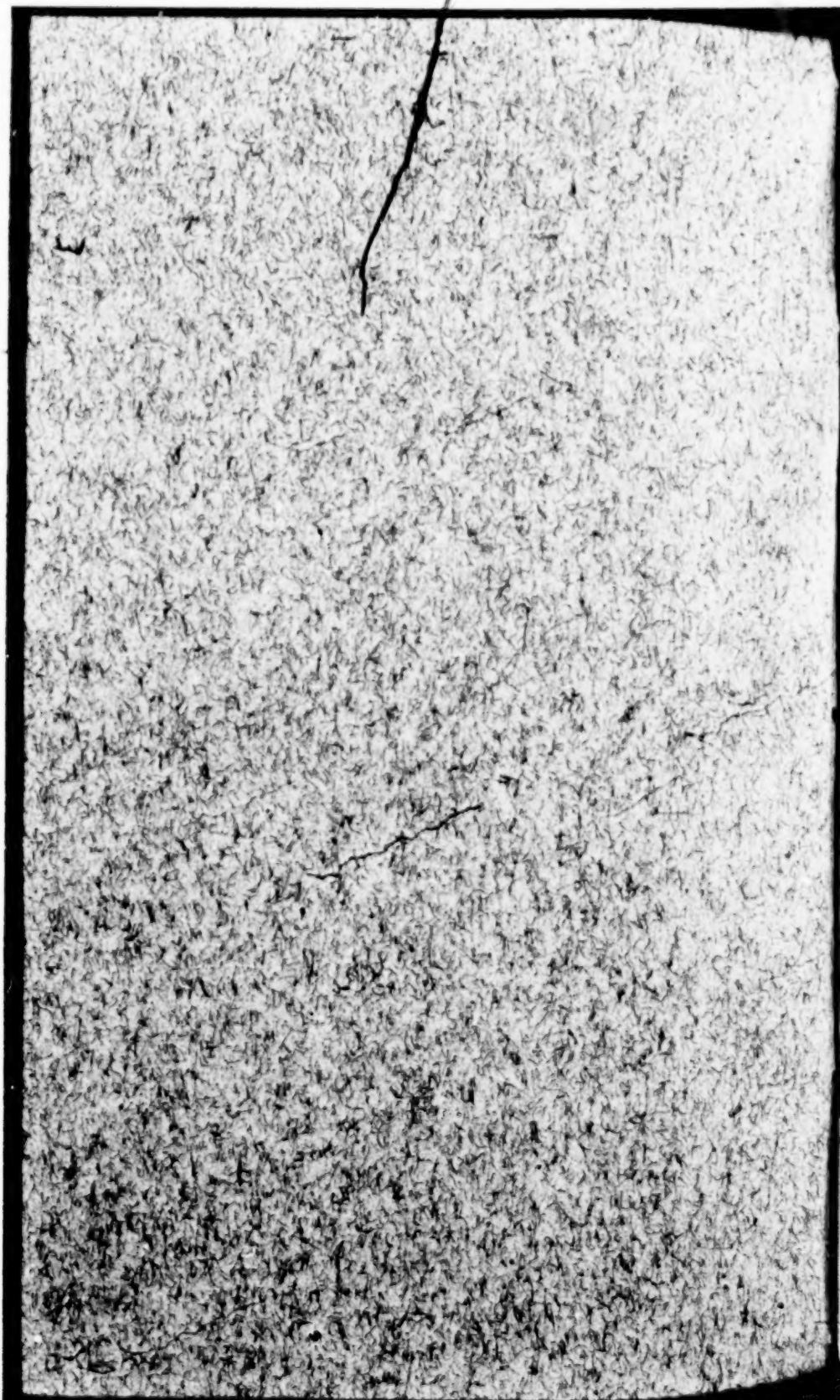
FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. A. RITTENHOUSE,
H. C. THURMAN,
Counsel for Petitioners.



INDEX.

Subject Index.

	Page
Petition for writs of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writs	2
Prayer for writs	6
Brief in support of petition for writs of certiorari	9
Argument	9
Conclusion	20

Table of Cases Cited.

Ætna Life Insurance Co. v. Moore, 231 U. S., 543; 58 L. Ed., 356; 34 Sup. Ct., 186	19
American Eagle Fire Insurance Co. v. Lively, 286 Pac., 797	2, 10, 11, 13, 15
Atlas Reduction Co. v. New Zealand Ins. Co., 138 F., 497	19
Bank of South Jacksonville v. Hartford Fire Ins. Co., 1 F. (2d), 43	5
Bunch v. Cole, 263 U. S., 250; 44 Sup. Ct., 101; 68 L. Ed., 280	12
Central Union Telephone Co. v. City of Edwardsville, 46 Sup. Ct., 90; 269 U. S., 190; 70 L. Ed., 229	11
City of Chickasha v. Hollingsworth, 56 Okla., 341; 155 Pac., 859	3, 10
Chicago, M., St. P. & P. R. Co. v. Risty, 48 Sup. Ct., 396; 276 U. S., 567; 72 L. Ed., 703	11
Curtis-Gartside Co. v. Ætna Life Ins. Co., 100 Pac., 465	3
Fidelity-Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co., 3 F. (2d), 784	19
Fidelity-Union Fire Ins. Co. v. Kelleher, 13 F., 745	19
Fire Ass'n of Philadelphia v. Nime, 9 Fed. (2d), 28	19
Hartford Fire Ins. Co. v. Nance, 12 F. (2d), 575	19
Hunter v. City of Pittsburgh, 28 Sup. Ct., 40; 207 U. S., 161; 52 L. Ed., 151	12
Imperial Fire Ins. Co. v. County of Coos, 151 U. S., 452; 38 L. Ed., 231	6
Louisville Gas & Electric Co. v. Coleman, 48 Sup. Ct., 423; 277 U. S., 32; 72 L. Ed., 770	11

Page

Lumber Underwriters of New York v. Rife, 207 U. S., 605; 59 L. Ed., 1140..... 5, 18
Midland Valley R. R. Co. v. Price, 127 Okla., 106; 260 Pac., 26. 3, 10
Missouri Pacific Ry. Co. v. Western Assurance Co., 129 F., 610. 5
New York Life Insurance Co. v. Dunlevy, 214 F., 1; 130 C. C. A., —; affirmed 36 Sup. Ct., 613; 241 U. S., 518; 60 L. Ed., 1140..... 12
Northern Assurance Co. v. Grandview Bldg. Ass'n, 183 U. S., 308; 46 L. Ed., 212..... 5, 6, 18
North British & Mercantile Ins. Co. v. Lamar Harris, 34 F. (2d), 94..... 5
Penman v. St. Paul Fire & Marine Ins. Co., 246 U. S., 311; 54 L. Ed., 492; 30 Sup. Ct., 312..... 19
Peoples National Bank of Lynchburg v. Marye, 107 F., 570; 24 Sup. Ct., 68; 191 U. S., 272; 48 L. Ed., 180..... 12
Riddlebarger v. Hartford Fire Ins. Co., 74 U. S., 386; 19 L. Ed., 257 5
San Francisco Savings Union v. Western Assurance Co., 157 F., 695..... 5
Scottish Union & National Ins. Co. v. Encampment Smelting Co., 166 F., 231..... 4, 5, 16, 19
St. Paul Fire & Marine Ins. Co. v. Robinson, 72 Okla., 269; 180 Pac., 702..... 3, 10, 11, 15
Speed v. McMurray et al., 73 Okla., 325; 176 Pac., 506..... 3, 10
Stebbins v. Riley, 45 Sup. Ct., 424; 268 U. S., 137; 69 L. Ed., 884 11

STATUTES CITED.

Compiled Oklahoma Statutes, 1921, Section 5972..... 9, 11, 13, 15
5977..... 3

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FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Concordia Insurance Company of Milwaukee, Wisconsin, Royal Insurance Company,

Ltd., National Fire Insurance Company and Fire Association of Philadelphia, respectfully present to this Court this their petition for writs of certiorari, to be directed to the Circuit Court of Appeals for the Tenth Circuit and the clerk thereof, to certify to this Court the record and proceedings in the above consolidated case in said Court, wherein your petitioners were appellants and the respondent was appellee, together with the opinion of said Court therein, for review and determination of said cause by this Court.

Your petitioners further show that judgments were rendered against your petitioners respectively (Tr. 103-111) in the District Court of the United States for the Western District of Oklahoma, upon policies of fire insurance issued by petitioners to respondent, from which judgments an appeal was duly perfected to the Circuit Court of Appeals of the United States for the Tenth Circuit, and which Court affirmed such judgments (Opinion, Tr. 402-410).

Your petitioners further respectfully show that the said judgments of the trial court, affirmed as aforesaid by the Circuit Court of Appeals for the Tenth Circuit, are erroneous for the following reasons:

I.

That said judgments purport to and do decide an important question of local law, to wit, the construction of a State statute on the question of interest, diametrically opposed to the construction placed on said statute by the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insur-

ance Company *v.* Lively, — Okla. —, 286 Pac. 797, decided on April 8, 1930, and not yet reported in the Oklahoma Report, and in opposition to the decisions of the Supreme Court of the State of Oklahoma, in the following cases:

St. Paul Fire & Marine Insurance Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702;

City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859;

Speed *v.* McMurray *et al*, 73 Okla. 325, 176 Pac. 506;

Midland Valley Railroad Co. *v.* Price, 127 Okla. 106, 260 Pac. 26;

Curtis-Gartside Company *v.* Aetna Life Insurance Co. (Okla.), 169 Pac. 465.

That said Circuit Court of Appeals refused to follow the statute of Oklahoma as construed in the above cases and based its decision upon another statute of the State of Oklahoma, to wit, Section 5977, Compiled Oklahoma Statutes, 1921, which was inapplicable to this case. That the Supreme Court of Oklahoma has consistently held that interest runs from the date of judgment, which the Circuit Court of Appeals refused to follow, and decided otherwise.

II.

That said judgments are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, out of which the Circuit Court of Appeals for

the Tenth Circuit was formed, namely, the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of Scottish Union & National Insurance Company *v.* Encampment Smelting Company, 166 Fed. 231, said case laying down the rule that the provision of the fire-insurance policy requiring proof loss to be filed within sixty days is a condition precedent to the right of action and can only be waived in writing, and in the instant case, no written waiver of this provision was relied upon, and the Circuit Court of Appeals for the Tenth Circuit refused to follow the decision in Scottish Union & National Insurance Company *v.* Encampment Smelting Company, *supra*, and held that the provision of the policy requiring proof of loss to be filed within sixty days could be orally waived, which is diametrically opposed to the decisions heretofore in force in this jurisdiction.

III.

That said judgments purport to decide an important question of general law in a way which is untenable and in conflict with the great weight of authority in that the Circuit Court of Appeals in the instant case holds that there can be an oral waiver of a proof of loss under the terms and provisions of the fire-insurance policies sued on in this case, when, as a matter of fact, it is a well-settled principle of law in the Federal Court that where a policy or contract of insurance contains a standard provision with reference to waiver, as do the policies in the case at bar, parol evidence cannot be introduced to establish a

waiver, and that there can be no waiver of any of its conditions or provisions except such waiver be in writing, signed by the insurer or its duly authorized agent.

In support of this, we call the Court's attention to the following cases:

Northern Assurance Company *v.* Grandview Building Ass'n, 183 U. S. 308, 46 L. Ed. 212;

Lumber Underwriters of New York *v.* Rife, 207 U. S. 605, 69 L. Ed. 1140;

Scottish Union & National Insurance Co. *v.* Encampment Smelting Co., 166 Fed. 231;

Missouri, Pacific Ry. Co. *v.* Western Assurance Co., 129 Fed. 610;

San Francisco Savings Union *v.* Western Assurance Co., 157 Fed. 695;

Bank of South Jacksonville *v.* Hartford Fire Insurance Co., 1 Fed. (2d) 43;

Riddlebarger *v.* Hartford Fire Ins. Co., 74 U. S. 386, 19 L. Ed. 257;

North British & Mercantile Ins. Co. *v.* Lamar Harris, 34 Fed. (2d) 94.

That the great weight of Federal authority is to the effect that the standard provision of a fire-insurance policy requiring proof of loss within sixty days, unless the time thereof be extended in writing by the company, is a condition precedent to the right of action, and that such proof of loss must be filed within said period of time unless the filing thereof is extended or waived in writing, and that the decision in the instant

case is, therefore, contrary to the great weight of authority.

IV.

That the said judgments purport to decide an important question of Federal law, to wit, whether or not there can be an oral waiver of the provision of a standard fire-insurance policy requiring such proof of loss to be filed within sixty days unless the time thereof be extended in writing by the Company, which question has not been, but should be, settled by this Court. The nearest case on this subject by this Court is the leading case of Northern Assurance Company *v.* Grandview Building Ass'n. 183 U. S. 308, 46 L. Ed. 212, which case holds that the terms, provisions and conditions of a fire-insurance policy can be waived only in writing, and that a fire-insurance policy is a contract binding upon the assured when accepted, and also the case of Imperial Fire Insurance Company *v.* County of Coos, 151 U. S. 452, 38 L. Ed. 231, which deals with the question of oral waivers. Inasmuch as there are decisions of Circuit Courts diametrically opposed to one another on the subject of the oral waiver of proof of loss, it is important and essential that this Court pass upon and settle the law pertaining thereto.

WHEREFORE your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the United States for the Tenth Circuit, commanding that Court to certify and send to this

Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the cases of Concordia Insurance Company of Milwaukee *v.* School District No. 98 of Payne County, State of Oklahoma, No. 162; Royal Insurance Company, Ltd., *v.* School District No. 98 of Payne County, State of Oklahoma, No. 197; National Fire Insurance Company *v.* School District No. 98 of Payne County, State of Oklahoma, No. 198, and Fire Association of Philadelphia *v.* School District No. 98 of Payne County, State of Oklahoma, No. 199, and that the judgments rendered therein, as aforesaid, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioners will ever pray.

CONCORDIA INSURANCE COMPANY
OF MILWAUKEE, WISCONSIN,
ROYAL INSURANCE COMPANY, LTD.,
NATIONAL FIRE INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA,
By F. A. RITTENHOUSE, AND H. C. THURMAN,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

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FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

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SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

That the judgments and opinion of the United States Circuit Court of Appeals for the Tenth Circuit purport to construe a State Statute of the State of Oklahoma different from and opposed to the construction given it by the Supreme Court of Oklahoma.

The statute in question is Section 5972, Compiled Oklahoma Statutes, 1921, reading as follows:

> "Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Under the judgments as rendered, interest was rendered, interest was awarded by the trial court from May 2, 1926, said date being sixty days from the date on which proof of loss should have been furnished the insuring companies. Under the provisions of Section 5972, Compiled Oklahoma Statutes, 1921, *supra*, as construed by the decisions of the Supreme Court of the State of Oklahoma, interest should have been allowed only from the date of judgment, to wit, January 18, 1929.

The statute above referred to is construed in the following decisions by the Supreme Court of Oklahoma, to wit:

> St. Paul Fire & Marine Ins. Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702;
>
> City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859;
>
> Speed *v.* McMurray *et al.*, 73 Okla. 325, 176 Pac. 506;
>
> Midland Valley Ry. Co. *v.* Price, 127 Okla. 106, 260 Pac. 26;
>
> American Eagle Fire Ins. Co. *v.* Lively, 286 Pac. 797 (not yet reported in Oklahoma Reports).

In those cases, it is held that under said statute interest is not recoverable on an unliquidated claim except from date of judgment, pursuant to the language of the above statute; that the amount of the claim must be determined by a verdict of a jury or a judgment of a court, and that the claim is unliquidated, the laws of Oklahoma not authorizing the assessment of interest under such circumstances except from date of verdict or judgment.

Attention of the Court is called to the fact that the cases of St. Paul Fire & Marine Ins. Co. *v.* Robinson, *supra*, and American Eagle Fire Ins. Co. *v.* Lively, *supra*, are both actions upon policies of insurance, the former upon a policy of insurance covering against loss by hail and the latter an action upon a policy covering against loss by fire to contents of a dwelling house.

It is the contention of the petitioners that the trial court and the United States Circuit Court of Appeals for the Tenth Circuit are bound by the decisions of the Supreme Court of the State of Oklahoma in the construction to be given Section 5972, Compiled Oklahoma Statutes, 1921, *supra*.

Louisville Gas & Electric Co. *v.* Coleman, 48 Sup. Ct. 423, 277 U. S. 32, 72 L. Ed. 770;

Chicago, M., St. P. & P. R. Co. *v.* Risty, 48 Sup. Ct. 336, 276 U. S. 567, 72 L. Ed. 703;

Stebbins *v.* Riley, 45 Sup. Ct. 424, 268 U. S. 137, 69 L. Ed. 884;

Central Union Telephone Co. *v.* City of Edwardsville, 46 Sup. Ct. 90, 269 U. S. 190, 70 L. Ed. 229;

New York Life Insurance Co. *v.* Dunlevy, 214 Fed. 1, 130 C. C. A. 437, affirmed 36 Sup. Ct. 613, 241 U. S. 518, 60 L. Ed. 1140.

That decisions of a State Court of last resort construing a State statute will be followed by United States Courts, see

People's National Bank of Lynchburg *v.* Marye, 107 Fed. 570; decree modified and affirmed 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180,

and that the construction placed on a State statute by the State Court of last resort is binding on the Federal Courts, see further

Hunter *v.* City of Pittsburgh, 28 Sup. Ct. 40, 207 U. S. 161, 52 L. Ed. 151;

Bunch *v.* Cole, 44 Sup. Ct. 101, 263 U. S. 250, 68 L. Ed. 290.

It is respectfully submitted by the petitioners that the judgments of the trial court, affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, are erroneous on this question of the allowance of interest for the reason that the damages sought in such actions were unliquidated up to the time of the determination of the amount thereof by the judgments of the trial court; that the opinion rendered by the United States Circuit Court of Appeals for the Tenth Circuit sustaining said judgments failed to take into consideration the character of the building destroyed by fire January 2, 1926, namely, a school building; that it was a character of property not subject to sale or

exchange, and, therefore, had no fixed market value, and that there was no reasonable standard for determining the value of said building or the loss sustained by the School District, and that therefore, under the Oklahoma statute above quoted, the School District, where there was a *bona fide* dispute as to the amount of its loss, was not entitled to recover interest until the amount of the loss had been determined by the verdicts of the jury and the judgment of the trial court thereon.

In this connection, the attention of the Court is respectfully directed to the recent decision of the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company *v.* Lively, 286 Pac. 797 (not yet reported in the Oklahoma Reports). In that case, on the question of interest on the amount of the loss under fire insurance policy, the Court said:

> "It is next contended that the trial court erred in allowing plaintiff interest prior to judgment—interest was allowed from date of filing suit. St. Paul Fire & Marine Ins. Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702, and Schaff *v.* Hudgins, 96 Okla. 173, 221 Pac. 80, are cited in support of this contention. In our opinion, these cases are controlling. Section 5972, C. O. S. 1921, provides:
>
> "'Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a day certain, is entitled also to recover interest thereon from that day, except during such time as the debtor

is prevented by law, or by the act of the creditor from paying the debt.'

"Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof, we think interest should not have been allowed until the claim was reduced to judgment.

"Judgment should be modified by computing interest only from date of judgment, and, as so modified, should be affirmed."

With reference to the character of property involved in the loss under consideration by the Supreme Court of Oklahoma, the Court says:

"It further appears that the property destroyed consisted of library books and household furniture, the major part being books. Immediately after the fire, plaintiff made a list of the number of books on hand at the time of the fire and their value. At the trial, he was permitted to refer to this list in testifying as to the value of the books destroyed, and, after testifying that the value as set forth in this list was obtained partly from memory and partly from catalogs, he was permitted to testify, over objection of defendant, that the value thereof at the time of the loss was $3,558."

It is respectfully submitted that if the library books and household furniture in that case is a character of property the value of which is difficult of ascertainment, then there can be no question but that in the cases involved herein the school building, which had been altered and added to from time to time and which

was not even a character of property which could be sold or exchanged, it was more difficult to ascertain its actual and fair value than in the case of personal property, which was in fact articles being purchased and sold and whose prices were quoted in various catalogs used as a basis for determining value in that case.

It is further represented to this Honorable Court that said decision rendered as aforesaid by the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company *v.* Lively, *supra*, citing and approving the decision of said Court in St. Paul Fire & Marine Ins. Co. *v.* Robinson, *supra*, and following the rule of law therein laid down, has become final and has definitely established the rule in the State of Oklahoma relative to the allowance of interest on a claim under a fire insurance policy where, considering the nature of the property destroyed, it is difficult to ascertain the actual or fair value thereof, and a verdict of a jury or a judgment of a court is necessary to determine the loss or damage.

And it is respectfully submitted that the judgments of the trial court herein, and affirmed as aforesaid by the United States Circuit Court of Appeals for the Tenth Circuit, should be reversed for the reason that they are opposed to the construction given Section 5972, Compiled Oklahoma Statutes, 1921, *supra*, by the aforementioned decisions of the Supreme Court of the State of Oklahoma.

II.

The judgments in question are in conflict with the rule laid down in Scottish Union & National Ins. Co. v. Encampment Smelting Co., 166 Fed. 231 (8th Cir.), and other Federal decisions holding that the provision of a fire insurance policy requiring furnishing of proof of loss within sixty days after the date of loss is a condition precedent to the right to maintain action on the policy, and can be waived only in writing as provided by the policy sued on.

We quote here, for the convenience of the Court, again the proof of loss provisions of the policy sued on, and also the provisions thereof prescribing the manner in which any provision or condition of such policies may be waived:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege, or permission affecting the insurance under this policy exist

or be claimed by the insured unless so written or attached (Tr. 29-30).

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has

examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify (Tr. 35-36).

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required" (Tr. 36).

It is true that there are Federal decisions prior to the time of the insertion of these standard provisions which hold that waiver could be predicated upon oral or parol testimony, but these decisions were all prior to the insertion of these provisions in the policy with reference to waiver. The first time that this provision came before this Court for construction was in the case of the Northern Assurance Co. *v.* Grandview Building Ass'n, 183 U. S. 308, 46 L. Ed. 212, wherein this Court held that the language of the policy prescribing a limitation upon the authority of an agent of the insuring company to waive the violation of provisions of the policy is limited and restricted; that such waiver can be made only in writing indorsed upon the policy. This rule has been followed in numerous Federal decisions since the decisions in the case of Northern Assurance Co. *v.* Grandview Building Association, *supra*.

Lumber Underwriters of N. Y. *v.* Rife, 207 U. S. 605, 59 L. Ed. 1140;

Penman *v.* St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 54 L. Ed. 492, 30 Sup. Ct. 312;

Aetna Life Insurance Co. *v.* Moore, 231 U. S. 543, 559, 58 L. Ed. 356, 366, 34 Sup. Ct. 186;

Atlas Reduction Co. *v.* New Zealand Ins. Co. (8th Cir.), 138 Fed. 497;

Fidelity-Phenix Fire Ins. Co. *v.* Queen City Bus & Transfer Co., 3 Fed. (2d) 784, (4th Cir.);

Fidelity-Union Fire Ins. Co. *v.* Kelleher (9th Cir.), 13 Fed. (2d) 745;

Fire Ass'n of Philadelphia *v.* Nime, 9 Fed. (2d) 28;

Hartford Fire Ins. Co. *v.* Nance *et al.*, 12 Fed. (2d) 575 (6th Cir.).

In the case of Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231, it was held by the Eighth Circuit Court of Appeals that where the policy contains the standard provision prescribing the manner in which conditions contained in the policy may be waived, that the same constitutes a limitation upon the agent's power and authority to bind the insuring company by oral negotiations, and that the failure to furnish a proof of loss in the form and manner prescribed by the policy cannot be excused by a claimed waiver not in writing by an agent of the company, whose action was not ratified by the company.

It is, therefore, respectfully submitted that the judgments of the trial court herein, and affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, as aforesaid, are directly in conflict with

the decision of the Circuit Court of Appeals for the Eighth Circuit, out of which the Circuit Court of Appeals for the Tenth Circuit was formed, and directly in conflict with the decisions of this Court and the great weight of authority from the Federal Courts of the various Circuits of the United States, and that said judgments purport to decide an important question of general law in regard to the waiver of terms and provisions of a policy of insurance in a way which is untenable and in conflict with the great weight of authority in the Federal Courts.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and jurisdiction in order that your petitioners may be protected in their legal rights, and that they be not deprived thereof unjustly, and that to that end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

Respectfully submitted,

CONCORDIA INSURANCE COMPANY
OF MILWAUKEE, WISCONSIN,
ROYAL INSURANCE COMPANY, LTD.,
NATIONAL FIRE INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA,

By F. A. RITTENHOUSE AND H. C. THURMAN,

Oklahoma City, Oklahoma,

Counsel for Petitioners.